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Bartram Brown

IIT Chicago-Kent College of Law, bbrown@kentlaw.iit.edu

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THE PROTECTION OF HUMAN RIGHTS IN DISINTEGRATING STATES: A NEW CHALLENGE

BARTRAM S. BROWN*

The disintegration of existing States raises many complex issues of international law, issues which have gained a new prominence with recent events in areas formerly known as Yugoslavia and the USSR. The international legal doctrines normally applied to these issues are grounded in the traditional "state-centric" view of international law, a view which is increasingly outmoded, and which may finally and irretrievably have achieved obsolescence.

While it is now universally acknowledged that human rights violations raise issues of international law, and that they are a matter of international concern, international action to protect these rights is limited by considerations of national sovereignty. Generally speaking, states are less than enthusiastic about outside political action within their territory, even when that action is of a humanitarian nature.¹

Action by the international community to protect internationally recognized human rights is all the more problematic when the state within which the threatened individuals are located begins to disintegrate. The implicit state-centric assumption that a local regime could provide remedies to protect these rights, is inapplicable in these situations. There is therefore a need for rapid and radical development of norms, principles, and procedures permitting international action to protect human rights in situations where the disintegration of the state creates a vacuum of local legal authority. The recent practices of states and of international organizations indicate an implicit recognition of this fact. They demonstrate that political, diplomatic, and perhaps even military forms of intervention have come to be seen as necessary and legal means for the protection of human rights in disintegrating states.

The conceptual challenge which is presented by these events provides an impetus for changes not only in specific doctrines applicable to

* Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; A.B. 1974, Harvard University; J.D. 1977, Columbia University; Ph.D. 1989, Graduate Institute of International Studies, University of Geneva, Switzerland.

1. States do not usually resent economic aid, or the provision of food and medical supplies, except to the extent that this type of aid is linked to what are perceived as political conditions.

the disintegration of states, but also for changes in the general state-centric nature of the international legal order itself.

I. THE STATE-CENTRIC NATURE OF INTERNATIONAL LAW

According to the prevailing positivist conception of international law, that law derives its binding force from the consent of sovereign states. That consent may be expressed explicitly, as it is in treaties, or implicitly through the practices of states which give rise to rules of customary international law.² This is one important sense in which international law is centered on states, or "state-centric." In addition, international law was traditionally thought to create rights and obligations only for states. According to this view international law was a law by and for states, in which the rights of individuals had no place.

An important step beyond state-centrism is implicit in the idea of an international law of human rights, since the rights concerned are those of individuals, or groups of individuals rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty, while traditional "state-centric" approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion. This traditional concept of international law is inherently inadequate to the task of protecting the human rights and fundamental freedoms which the UN system is pledged to promote.

II. A DYNAMIC VIEW OF INTERNATIONAL LAW

International law must be capable of changing and adapting to the realities of the international system, just as it has adapted to such changes in the past. During the Middle Ages the prevailing conception of international law was that it reflected the application of the Law of Nature (natural law) to the conduct of states. When Europe's Holy Roman Empire collapsed, a new international system developed in its place, and it was supported by a new conception of international law. The 1648 Peace of Westphalia formalized the transition from a nominally unified

2. See Statute of the International Court of Justice, art. 38, which defines the law which that court is to apply in deciding disputes between states. This authoritative statement of the sources of international law refers to three principal sources, i.e. "a. international conventions . . . establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law;" and "c. the general principles of law recognized by civilized nations." Each of these involves building law upon the recognition or acceptance of states or nations, i.e. upon their consent. Judicial decisions and the teachings of publicists are referred to as "subsidiary means for the determination of rules of law." *Id.* art. 38(d).

Empire to a system of sovereign Nation-States.³ New theories of international law developed by Grotius,⁴ among others, adapted the prevailing concepts of natural law to the changed conditions by divorcing it from Catholic theology and supplementing it with notions of positive international law. By the 19th century most states in regions formerly part of the Empire no longer accepted the theologically based notion that they were subject to obligations stemming from natural law. The idea of a positive international law based on the consent of states emerged as the only generally acceptable theory of international legal obligation.

More recently, this process of evolution and development has taken international law in the direction of a renewed interest in positive expressions of natural law concepts. It is in the field of international human rights that it is most difficult to insist upon a purely positivistic model of international law. The idea of universal human rights has its origins in the concept of natural law, but the international law of human rights has developed well beyond its philosophical origins.

The horrors of the Nazi holocaust brought home to many the need for a positive international law of human rights. When concerned people and governments abroad protested the treatment of Jews and other oppressed groups in Germany, Hitler rejected these protestations by characterizing the issue as a matter within the domestic jurisdiction and national sovereignty of the German state. Although the genocidal "final solution" was morally abhorrent and unmistakably wrong, its illegality under positive international law was less clear. The inadequacy of the existing positive international law became apparent, and this provided the impetus for changes to come.

Since the Second World War there has been a major thrust toward the enactment of a positive international law of human rights. By articulating human rights norms in treaties and other international normative instruments, States and international organizations have done more than simply create a few more rules of positive international law. They have begun to transform the nature of the international system.

III. THE UNITED NATIONS CHARTER AND HUMAN RIGHTS

The United Nations Charter represented a major advance in the codification of the international political order, and it did much to de-

3. See Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1949).

4. See HUGO GROTIUS, *DE JURE BELLI AC PACIS, LIBRI TRES. (ON THE LAW OF WAR AND PEACE)* (Francis W. Kelsey et al. trans., Oceana 1964) (1646). Grotius lived from 1583 to 1645. This work was first published in 1646.

velop the international legal order as well. Promoting and encouraging respect for human rights and fundamental freedoms for all is explicitly mentioned as one of that organization's purposes,⁵ and thus human rights were for the first time definitively declared to be a matter of international concern. At the same time, the Charter is not very specific about the human rights and freedoms to be promoted.

Another problem is that the Charter also expresses principles which can be invoked against international action to protect human rights. It reaffirms the "sovereign equality" of UN member states,⁶ and the UN's lack of authority to intervene in the domestic jurisdiction of its members.⁷ The latter two provisions serve to reinforce the argument that state sovereignty should preclude any intrusive international action for the protection of human rights.

Some of these deficiencies were remedied when the Universal Declaration of Human Rights⁸ was adopted by the UN General Assembly in 1948, and the post-Charter evolution of international human rights norms and procedures began. The Universal Declaration proclaims itself "as a common standard of achievement for all peoples and all nations"⁹ in the field of human rights, and it is, in fact, the most frequently cited standard of international human rights. But as a resolution of the UN General Assembly it is formally non-binding, and this raises the question of its effect upon the development of international human rights law.

Georges Abi-Saab has noted that the normative effect of UN General Assembly resolutions depends upon three factors: the degree of consensus behind the resolution, the degree of concreteness of the normative language in the resolution, and the extent to which mechanisms of implementation have been provided for.¹⁰ The Universal Declaration was adopted by the General Assembly with no negative votes (although there were 8 abstentions); thus, the consensus behind that resolution was very strong. Today, more than 40 years after the adoption of the Declaration, the international consensus on the question of human rights remains strong, and as far as concreteness is concerned, the Universal Declara-

5. See U.N. CHARTER pmb., art. 1, ¶ 3.

6. *Id.* art. 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members.").

7. *Id.* art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .").

8. G.A. Res. 217, U.N. GAOR, 3d Sess., at 71-79, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

9. *Id.* at 72.

10. See Georges Abi-Saab, *Introduction*, in *LES RESOLUTIONS DANS LA FORMATION DU DROIT INTERNATIONAL DU DÉVELOPPEMENT* 9, 9-10 (1971).

tion represents a vast improvement over the general human rights language found in the UN Charter.

Like the UN Charter before it, the Universal Declaration contains no specific authorization for UN action in the field of human rights. But over the years, as international human rights norms have gained strength, certain UN mechanisms for the application of these norms have developed well beyond anything explicitly authorized by the Charter. Only in Article 68 does the Charter mention an organ or mechanism for the promotion or protection of human rights. While that article provides for the creation of a UN Commission for the promotion of human rights, operating under the United Nations Economic and Social Council (ECOSOC), it does not invest that commission with any specific powers.¹¹

It is in the context of the deficiencies of the Charter that we must evaluate the so called "1503 procedure" of the United Nations Human Rights Commission, which represents only a minimal intrusion upon state sovereignty. It does not involve any coercive method of enforcement, but instead it relies upon the use of publicity to "shame" states into improving their human rights records.

In 1947 ECOSOC decided that it had "no power" to take any action in regard to any complaints regarding human rights.¹² Thus it could not take any action on any of the many complaints it began receiving as soon as the UN was created. In 1959 it confirmed this lack of power in another resolution,¹³ and at the same time consolidated UN procedures for cataloging these communications and reporting on them. As UN Human Rights procedures have developed since that time, they have stressed a confidential approach to the consideration of complaints about human rights.

ECOSOC Resolution 1503¹⁴ establishes a confidential procedure by which the UN Human Rights Commission and its subsidiary organs can consider communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. This resolution does not grant the Human Rights Commission any authority to take di-

11. "The Economic and Social Council shall set up commissions in the economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." U.N. CHARTER art. 68. No specific authority is granted to any of these commissions under the Charter.

12. E.S.C. Res. 75, U.N. ESCOR, 5th Sess., at 20, U.N. Doc. E/573 (1947).

13. E.S.C. Res. 728F, U.N. ESCOR, 28th Sess., Supp. No. 1, at 19, U.N. Doc. E/3290 (1959).

14. E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add. 1 (1970).

rect action for the enforcement of human rights. What the Commission can do, after carefully examining a reported situation, is to make recommendations to ECOSOC about the need for further investigation. Under the 1503 procedure all actions taken by the UN remain confidential until such time as the Commission may decide to make recommendations to ECOSOC.¹⁵

The 1503 procedure is very limited. It is slow, and it applies only to situations where there have been large scale or systematic denials of fundamental human rights. The confidential, non-public nature of the procedure is often criticized as well. But the confidential nature of the procedure allows for the judicious use of the "shaming" power. States under review for human rights violations generally prefer to avoid public disclosure of this fact. This provides an incentive for them to cooperate with the Commission in the hope of avoiding the adverse publicity which results from a failure to resolve matters with the Commission behind the scenes.

The 1503 procedure is supplemented by a public procedure under Resolution 1235.¹⁶ This procedure serves as an important basis for debate and public discussion during the annual meetings of the Commission and Sub-Commission on Human Rights. This procedure sometimes leads to resolutions being adopted by the Commission or Sub-Commission, expressing concern about human rights violations in particular countries. Special rapporteurs, special representatives, experts, and other envoys are also sometimes sent to countries pursuant to the 1235 procedure.

UN procedures for addressing systematic violations of human rights involve only a minimal intrusion upon the sovereignty of its Member States.¹⁷ In fact, these procedures rely upon the existence of a national authority politically responsible for the local human rights situation. How then can the UN act to protect human rights in cases where state authority is in a state of disintegration?

IV. THE SPECIAL PROBLEM OF DISINTEGRATING STATES

Can international law, still bridled by state-centric limitations, be effective at protecting human rights in disintegrating states? A number

15. *Id.* art. 8.

16. E.S.C. Res. 1235, U.N. ESCOR, 42nd Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967).

17. This discussion of action under Resolutions 1503 and 1235 refers only to UN procedures of general applicability. There are a number of other UN procedures which are applicable to states which have consented to be bound by UN negotiated human rights treaties such as the Convention Against Torture and the International Covenant on Civil and Political Rights.

of special human rights problems are raised by this situation. The disintegration of state authority is often accompanied by a situation in which the pre-existing government is at war with opposition groups or secessionist groups. In such difficult times the government may take extreme measures, inconsistent with human rights, in an effort to regain control of the situation.

A number of human rights treaties have attempted to deal with this problem head on. The International Covenant on Civil and Political Rights,¹⁸ for example, allows parties to take measures derogating from of all but seven of the most fundamental rights set out in that treaty, but only "[i]n time of public emergency," and "to the extent required by the exigencies of the situation."¹⁹

In order to limit invocation of this right of derogation, the Covenant requires that the derogating party give notice to the other parties through the UN Secretary General.²⁰ The Covenant does not permit any measures derogating from certain fundamental rules, i.e., the rights to life, and to recognition as a person before the law; freedom of thought, conscience, and religion; and the prohibitions of torture, cruel and unusual punishment, slavery, the slave trade, debtors prison, and *ex post facto* laws.²¹ Similar provisions can be found in other human rights treaties such as Europe's Convention for the Protection of Human Rights and Fundamental Freedoms²² and the American Convention of Human Rights,²³ although the list of "non-derogable" human rights varies slightly among them.

These treaties indicate a growing consensus that even in a time of

18. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1967).

19. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Id. art. 4(1).

20. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Id. art. 4(3).

21. *Id.* art. 4(2) ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.").

22. See The [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 222, 232 (entered into force Sept. 3, 1953).

23. See The American Convention of Human Rights, Nov. 22, 1969, 36 O.A.S. Treaty Series 1, 9 I.L.M. 99, 101.

emergency, such as when the state itself begins to disintegrate, the state remains responsible under international law, for the respect of basic "non-derogable" human rights. While the treaties bind only the parties, they are also evidence of state practice and as such can contribute to the development of customary international law. It is beyond dispute that a customary international law of human rights does now exist, and thus even states which are not parties to any of the treaties mentioned in the preceding paragraph have human rights obligations under customary international law. That law includes the obligation to respect the most fundamental human rights even in time of public emergency, and when the government of any state violates these rights it has violated international law. While this does not always prevent desperate governments from violating basic human rights, the principle of responsibility does at least provide for a certain level of deterrence. In practice these international human rights norms are "enforced" only by the sanction of adverse international publicity or "shaming." Unfortunately, some of the other forces responsible for human rights violations are not as susceptible to the pressure of "shaming."

Not all human rights violations are the direct responsibility of States and their governments. The disintegration of the state can bring about a lawless situation in which other, non-government affiliated groups commit human rights violations with relative impunity. Holding the state responsible in such situations is certainly not an adequate way to ensure respect for human rights.

When it functions, the domestic legal order of the sovereign state should serve as the primary means of protecting human rights. Thus the negation of the domestic legal order can contribute to the negation of human rights protections. The situation in Lebanon over the past several years demonstrates how difficult it can be to protect human rights when there is no effective authority within a state.

Although the Universal Declaration of Human Rights provides that "[n]o one shall be subject to arbitrary arrest" (Article 9), and that everyone has the right to the protection of the law against arbitrary interference with his privacy, family, home, or correspondence (Article 12); the Lebanese government could not guarantee either of these rights to the Western hostages held in that country.²⁴ It is doubtful whether human

24. Most victims of human rights violations in Lebanon have been Lebanese nationals whose basic rights such as the right "to life, liberty and the security of person," Universal Declaration, *supra* note 8, at 72, have been jeopardized by the chaos in that country. The suffering of the western hostages is mentioned here only because their experiences may be better known to the outside world.

rights can ever be guaranteed without an effective governmental authority which maintains a certain degree of law and order.

One problem is that when central government authority breaks down, there is often no single authority which can be held accountable for human rights violations, and no single authority which can act to protect human rights. Another is that the public "shaming" often used to induce improved human rights performance works most effectively with established governments, and is less effective against ill identified groups contending for power.

The four Geneva Conventions, in their "Common Article 3," create special principles of "humanitarian law"²⁵ to help to fill this gap in international human rights law. Common Article 3 sets out general rules of law applicable to "armed conflicts not of an international character" such as internal armed insurgencies. These rules, which are applicable to all parties to any of the Geneva Conventions, prohibit certain specified acts of inhumane treatment against persons taking no active part in the hostilities.²⁶ While the applicability of these rules to acts by insurgents, rebels, or other non-state entities is complicated by the fact that these entities are not formal parties to the Geneva Conventions, it seems clear that these rules are now customary international law and thus are applicable not only to states, but to actors at all levels of the international system.²⁷ This is but one example of how humanitarian imperatives have pushed international law beyond state-centrism.

V. THEORETICAL PERSPECTIVES ON THE SHIFT AWAY FROM STATE-CENTRIC INTERNATIONAL LAW

A number of scholars have suggested that international law must progress from its state-centric roots into a more evolved system which

25. "Humanitarian law is that considerable portion of international law which is inspired by a feeling for humanity and is centred on the protection of the individual in time of war." JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 1 (1985).

26. See the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 3 of this convention is identical to the Article 3 of the other Geneva Conventions of 1949, thus the designation "Common Article 3." That article prohibits all of the following acts against noncombatants:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

6 U.S.T. at 3520, 75 U.N.T.S. at 290.

27. Pictet observes that "Article 3 constitutes an essential step toward universality for the law of Geneva." PICTET, *supra* note 25, at 47.

protects the rights and interests not only of states but of peoples and individuals as well. W. Michael Reisman²⁸ argues that international human rights norms are "constitutive norms," in that they imply a radical and qualitative change in international law as a whole. Thus he sees the need for a process which might be referred to as the "updating," "contemporization," or "actualization" of international norms in light of human rights norms. He asserts that "[p]recisely because the human rights norms are constitutive, other norms must be reinterpreted in their light."

Reisman focuses upon the need for a contemporized concept of "sovereignty," which recognizes that a government may violate the sovereignty of its own people, and that outside intervention may, in some cases, be consistent with sovereignty.²⁹ He points out that today popular sovereignty is "firmly rooted as one of the fundamental postulates of political legitimacy,"³⁰ and notes that "[i]nternational law is still concerned with the protection of sovereignty, but, in its modern sense, the object of the protection is not the power base of the tyrant . . . but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors."³¹

Reisman is correct in asserting that state sovereignty must be redefined in light of human rights norms before those norms can be put into effect. It is now commonly accepted that governments exercising sovereign prerogatives do so subject to an obligation to respect human rights.

Philip Allott has also stressed deficiencies in the state-centric approach to international law.³² He observes that the concept of "state necessity," sometimes invoked by states to justify unlawful behavior, is "the most persistent and formidable enemy of a truly human society."³³ Allott criticizes the work of the International Law Commission in the field of state responsibility by noting that it "affirms rather than constrains power," and also "reveals the long-term destructive effect of a government dominated commission on the development of international law."³⁴ He laments that international law "is trapped in the prerevolutionary world of the eighteenth century" and that "[t]he international

28. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990).

29. *Id.* at 872, 876.

30. *Id.* at 867.

31. *Id.* at 872.

32. Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1 (1988).

33. *Id.* at 17.

34. *Id.* at 2.

law of the old regime is preventing the emergence of the new international society."³⁵

Allott follows his criticisms of the old international law with proposals for the manifesto of a new international law in a new international society. Many of his proposals relate directly to the need to move beyond the state-centric concept of international law. Two in particular are worth mentioning here. He proposes:

- (1) to acknowledge the peoples of the world as the true subjects of international law, even if the societies known as states continue to be, for the time being, the formal subjects of international law;
- (2) to accept state practice as the legislative source of the customary form of international law, but state practice in the Grotian spirit, that is, the universal experience of mankind in society³⁶

Allott's points here could be reformulated as follows: (1) the real purpose of international law is to promote the well-being of "peoples" and not states; and (2) it therefore makes little sense to allow the necessary development of customary international law to be blocked by the inevitable reluctance of many state actors to relinquish the exalted status which they presently enjoy, a status which prevents them from being subjected to the rule of law in any meaningful sense. In essence, then, he is calling for progress beyond the state-centric model of international law.

Over the years many non-lawyers have also proposed moving beyond the state-centric international system. One of the best known and most influential of them was David Mitrany. Mitrany formulated and disseminated a theory of international organization known as "functionalism."³⁷ This theory holds that a world community can best be achieved, not by attempts at the immediate political union of states, but by the creation of non-political international agencies dealing with specific economic, social, technical, or humanitarian functions. Functionalism assumes that economic, social, and technical problems can be separated from political problems and insulated from political pressures. Because of the greater difficulties involved in resolving political problems, the theory maintains that non-political forms of international cooperation should be given priority, and that only later, after states have developed habits of effective international cooperation concerning such

35. "International law is trapped in the prerevolutionary world of the eighteenth century, the world made by Vattel, the world before the American and French Revolutions, before Rousseau and Marx. The international law of the old regime is preventing the emergence of the new international society." *Id.* at 25.

36. *Id.* at 26.

37. See DAVID MITRANY, *A WORKING PEACE SYSTEM* (4th ed. 1946), for the most classic exposition of the theory of functionalism.

matters, will it be possible to apply the new cooperative skills and habits to high-level political problems.³⁸ Mitrany's theory of functionalism was so widely read and discussed during the 1940's (when the UN was founded) that it is sometimes said to form an important part of the theoretical basis for the creation of the UN system of specialized agencies.³⁹ There have always been doubts about the basic assumptions behind the theory.⁴⁰ In spite of these problems, the theory of functionalism is an important theoretical antecedent to the present discussion.

Among other things, Mitrany's theory suggested that eventually the "loyalty" of individuals would shift from the state to international institutions as they became increasingly effective at providing for the needs of people around the world. Recent events suggest that it is not so much the loyalties of individuals as the bases of "legitimacy" which are shifting upwards from the state to international institutions and international human rights norms. Whereas the state-centric model tells us that international law is established and made legitimate by the consent of states, it is now increasingly true that international law, especially international human rights law, provides the standard by which the legitimacy of states is established.

These developments are all part of a fundamental shift away from the old state-centric international law. Ironically, the evidence of this shift can be found in the practice of states themselves. This shift in the center of the international legal and political universe is so fundamental that it may be said to constitute a "Copernican revolution"—a paradigm shift in which existing conceptions have to be rethought because of a new view or understanding of what constitutes the "center."⁴¹

38. Inis L. Claude Jr. calls this the "separability-priority" thesis. INIS L. CLAUDE JR., *WORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATION* 384 (4th ed. 1971).

39. Eckart Klein has gone so far as to say that "[t]he conceptual basis of the Specialized Agencies is functionalism." Eckart Klein, *United Nations, Specialized Agencies*, in 5 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 349, 366 (1983).

40. See CLAUDE, *supra* note 38, 38-391. The assumption that economic, social, and technical matters can be effectively separated from politics is particularly dubious. With regard to this assumption Inis L. Claude Jr. has asked rhetorically, "Does not this assumption fly in the face of the evidence that a trend toward politicization of all issues is operative in the twentieth century?" *Id.* at 388.

41. In 1512 the Polish astronomer Copernicus radically transformed the European view of the cosmos by affirming that the Earth and the other planets revolve around the sun. Before Copernicus, the Western World believed the Earth to be the center of the universe. For more on the notion of a paradigm shift, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

VI. EVIDENCE OF A COPERNICAN REVOLUTION IN RECENT STATE PRACTICE

As mentioned earlier, it is now commonly accepted that governments exercising sovereign prerogatives do so subject to an obligation to respect human rights. Thus state sovereignty has already been redefined to a certain extent to accommodate the new "constitutive" human rights norms. The extent to which this has happened can be confirmed from the practice of states and international organizations, which by their actions have established the right of the international community to act when human rights violations shock the conscience of the world and threaten international peace and security.

Since 1945 Chapter VII of the UN Charter has, in theory, provided a means for coordinated international action to cope with any threat to the peace, breach of the peace, or act of aggression. In practice, however, this flexible legal and institutional framework was rarely functional. In the past, the Cold War tensions between the US and the USSR precluded effective action by the Security Council, and this paralysis was thought to reflect the fundamental political realities of the era. However, with the advent of a post Cold War world, this excuse for international inaction and ineffectiveness is no longer available. It is now time for the international community to demonstrate that it can indeed act as a community. The international response to Iraq's invasion of Kuwait demonstrated that a coordinated response to international aggression can now be achieved. The crises resulting from the disintegration of states such as Yugoslavia and the former Soviet Union provide a first test of whether the international community can act effectively when the threat to peace and security results from tensions and conflict internal to an existing state.

A. Non-Violent Political and Diplomatic Intercession

By their actions states have clearly recognized a right of international humanitarian political intercession, as distinguished from military intervention, in cases where human rights violations are credibly alleged to have occurred. UN diplomatic intercession is now common with regard to human rights matters which were formerly considered to be "essentially within the domestic jurisdiction" of the state under Article 2(7) of the UN Charter. Like many other international standards, Article 2(7) has implicitly been reinterpreted (and restricted) as the constitutive norms of international human rights law have developed. This has been

especially apparent in cases where there has been a disintegration of state authority.

The breakdown of the state undermines the argument that state sovereignty is being violated by multilateral action. It seems quite logical that sovereignty, when absent *de facto*, need not be so rigidly and formalistically deferred to, especially not by legitimate international institutions taking humanitarian action.

1. The Example of OAS Intercession in Haiti

The people of Haiti have long endured both dictatorial rulers and renegade military and paramilitary death squads. But since the Charter of the Organization of American States (OAS) reflects an even stronger standard of non-intervention than that in the UN Charter, there was little that organization could do about the situation. Recently the Organization of American States has taken a prominent role in arranging negotiations between ousted Haitian President Jean-Bertrand Aristide and the present military government in Haiti. Aristide is the first democratically elected President in the history of Haiti, and the OAS has so far insisted upon his return to power as the best means of restoring democracy to that country. The hope of ending an OAS economic embargo against Haiti provided the military government with a strong incentive for cooperation with the regional organization.⁴²

By this combination of actions the OAS has interceded in the internal politics of Haiti, and not all American states are entirely comfortable with this. In this case, though, the forces generated by the global trend towards democracy may be too compelling to be denied. Both Haitian military leaders and President Aristide have agreed to an OAS brokered arrangement, although there is still some doubt as to whether President Aristide will ever regain full constitutional authority in that country. At one point, military intervention was reportedly being considered as one way of ending the mass violations of human rights in that country, and of insuring President Aristide's return to power.⁴³ Although this is not likely to happen, the present level of OAS involvement in the situation is quite remarkable, and it provides a clear example of the trend towards stronger multilateral political intercession/intervention for the promotion of human rights.

42. See Thomas L. Friedman, *Regional Group Agrees to Increase Penalties on Haiti*, N.Y. TIMES, Oct. 9, 1991, at A3.

43. See Barbara Crosette, *Plan for Global Peacekeepers to Soothe Haiti is Weighed*, N.Y. TIMES, Feb. 14, 1992, at A12.

2. New Standards of Diplomatic Recognition

The right to self determination of peoples has always been rather vaguely defined. In practice, the exercise of this right has often been subordinated to the state sovereignty of established states and concern about maintaining their territorial integrity. The right to self-determination has both external and internal dimensions, but the internal dimension has not been given much consideration by the international community due to what now appear to be overbroad concerns about sovereignty.⁴⁴

The most significant manifestation of this right was the process of decolonization which occurred after the Second World War. Decolonization was concerned primarily with the external dimension of self-determination. A consensus was reached to the effect that the right to self-determination required the end of external colonial domination. There is considerably less consensus concerning the applicability of that right within a state.

Recent debates concerning when it might be appropriate to recognize breakaway states concern the relative importance of 1) the state-centric right of territorial integrity, and 2) a subject people's right to self-determination. By deciding to recognize many of these states⁴⁵ even before they were *de facto* independent, the recognizing states have in effect distanced themselves from the predominant state-centric view of international law.

In an early stage of the disintegration of the former USSR, the lack of effective control of territory, border posts, etc. by the Baltic states was invoked by President George Bush as a situation precluding their legal recognition by the United States.⁴⁶ This position was entirely consistent with the traditional approach to recognition. However, had all states held to this view, the international community would have been left with no effective means for promoting and protecting the national rights of these peoples. As it happened, the timid approach was jettisoned when it

44. B.G. Ramcharan, *Strategies for the International Protection of Human Rights in the 1990's*, 13 HUM. RTS. Q. 155, 164 (1991).

45. Among the new states which were recognized by a substantial portion of the international community before they had gained *de facto* control over their territory were Croatia and Bosnia-Herzegovina; as well as the Baltic States: Latvia, Lithuania, and Estonia.

46. At a news conference with Canadian Prime Minister Mulroney on August 26, 1991, President Bush mentioned a number of political factors influencing his decision on whether to recognize the Baltic republics, and then noted: "... But also, I want to know a little more about controlling one's own territory and what you're recognizing. I mean, there are some difficulties there. Lithuania, today, for example, is different than the Lithuania that had its freedom and that was recognized by us." See *Change in Soviet Union President Bush, Canadian Prime Minister Mulroney*, DEP'T ST. DISPATCH, Sept. 2, 1991, at 8.

became apparent that it did not allow for an adequate response to the situation which had developed in late 1991. The European Community States were among the first to recognize Latvia, Lithuania, and Estonia as independent states,⁴⁷ and the United States followed suit a few days later.⁴⁸

Some countries, such as those of the European Community, have tied their decisions on recognition of breakaway states to specific conditions concerning respect for the human rights of individuals and minorities within the newly constituted states.⁴⁹ This is yet another example of the increased willingness of states to use non-violent political intercession to promote respect for internationally recognized human rights.

B. *UN Peacekeeping and Human Rights*

In January of 1991, the United Nations Security Council held its first ever Security Council summit, a meeting of the Council at which the members were represented by their heads of state. The final declaration approved by the 15 world leaders at that summit acknowledges the extent to which the role of UN peacekeeping has changed since the end of the Cold War.

The members of the Council note that United Nations peacekeeping tasks have increased and broadened considerably in recent years. *Election monitoring, human-rights verification and the repatriation of refugees have in the settlement of some regional conflicts, at the request or with the agreement of the parties concerned, been integral parts of the Security Council's effort to maintain international peace and security. They welcome these developments.*

The members of the Council also recognize that change, however welcome, has brought new risks for stability and security. *Some of the most acute problems result from changes to state structures.* The members of the Council will encourage all efforts to help achieve peace, stability and cooperation during these changes. . . .

The international community therefore faces new challenges in the search for peace. All member states expect the United Nations to play a central role at this crucial stage. The members of the Council stress the importance of strengthening and improving the United Nations to increase its effectiveness. They are determined to assume fully

47. Andrew Rosenthal, *A Mosaic of Motives: The West's Response to Baltic Quest for Independence*, N.Y. TIMES, Aug. 28, 1991, at A11.

48. Andrew Rosenthal, *Soviet Turmoil: Gorbachev, Yeltsin and Republic Leaders Move to Take Power from Soviet Congress*, N.Y. TIMES, Sept. 3, 1991, at A1.

49. According to Foreign Minister Hans van den Broek of the Netherlands, the EC states insisted upon two principles regarding recognition, i.e. "that there be no unilateral change of borders between the republics, especially by force, and that each republic respect the rights of minorities." Steven Greenhouse, *Soviet Turmoil: Gorbachev Threatens to Quit Unless Republics Find a Way to Preserve a Modified Union; A Gain for Baltics*, N.Y. TIMES, Aug. 28, 1991, at A1, A11.

their responsibilities within the United Nations Organization in the framework of the Charter.

The absence of war and military conflicts amongst states does not in itself insure international peace and security. *The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.* The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.⁵⁰

1. UN Peacekeeping in Yugoslavia's "Internal" Dispute

The UN presence in Yugoslavia provides an excellent example of the new broader role for UN peacekeeping described above, especially as it applies to the "acute problems [which] result from changes to state structures." Traditionally, UN peacekeeping has been used only when international peace and security was threatened by tensions between two or more states. In Yugoslavia, however, the conflict has so far been entirely confined to the territory of what until recently was a single UN member state. Nonetheless, on September 25, 1991 the Security Council passed a resolution imposing an arms embargo upon Yugoslavia,⁵¹ and then in February of 1992 it passed a resolution authorizing the creation of a peacekeeping force in that country known as the United Nations Protection Force (UNPROFOR).⁵² At that time Yugoslavia was still, officially, a single state, and the purpose of UNPROFOR was to prevent conflict among groups within Yugoslavia, and thereby to help create the conditions of peace and security required for negotiation of an overall political settlement among the contending parties there.

That action was considerably more than simple political intercession, but was still less intrusive than coercive military intervention. Like all UN peacekeeping operations, UNPROFOR was deployed with the consent of the territorial sovereign; in this case with the consent of both the Yugoslav government and the other principal factions there. UNPROFOR remains in place with the consent of those states on whose territory it continues to operate, for example, Bosnia-Herzegovina and Croatia.

As UNPROFOR was being created the idea of authorizing it as a potentially coercive force under Chapter VII of the UN Charter⁵³ was

50. *Text of Final Declaration for U.N. Summit*, N.Y. TIMES, Feb. 1, 1992, § 1, at 4 (emphasis added).

51. See S.C. Res. 713, U.N. Doc. S/RES/713 (1991).

52. See S.C. Res. 743, U.N. Doc. S/RES/743 (1992).

53. If the UNPROFOR force had been authorized under Chapter VII of the Charter it would have the authority to operate in Yugoslavia even if the Yugoslavian government (and/or other parties to that conflict) were to withdraw their consent to the presence of UN forces on their territory.

considered, but ultimately rejected. Nonetheless coercive UN military action in Yugoslavia has been approved in the form of a UN enforced "no fly zone" over Bosnia-Herzegovina.⁵⁴ The enforcement of such a zone under UN auspices could take the level of UN involvement in Yugoslavia well beyond anything authorized there so far.⁵⁵

Ironically, and as a direct result of what was once perceived as an "internal" Yugoslavian conflict, Bosnia-Herzegovina and Croatia are now independent states and members of the UN, while for the moment, the rump Yugoslavia (Serbia and Montenegro) is no longer recognized as a member of the UN.⁵⁶ The UN's political and diplomatic intercession in Yugoslavia has thus progressed through phases including sanctions, the deployment of peacekeeping forces, the admission of breakaway former Yugoslav republics as independent UN members, and now the expulsion of the remaining Yugoslav state from membership in the UN.

2. UN Peacekeeping in Cambodia

Like Yugoslavia, the situation in Cambodia has been one of war and disintegration. But unlike Yugoslavia, the conflict has been ongoing for almost two decades, and the factions are politically and not ethnically divided. Although outside intervention has done much to complicate the Cambodian situation, for years the conflict has been primarily one between local factions, some of them quite literally genocidal.⁵⁷ Only in recent years, however, has the UN been able to intercede diplomatically in an effort to bring peace to that country. With the adoption of Security Council resolution 945 on February 28, 1992, authorizing the creation of UNTAC (United Nations Transitional Authority in Cambodia), the UN

The decisions of the Security Council taken under Chapter VII are binding upon the members of the UN. See U.N. CHARTER art. 25, 39-51.

54. See S.C. Res. 781, U.N. Doc. S/RES/781 (1992) (establishing a ban on military flights in the air space above Bosnia and Herzegovina). This ban does not apply to UNPROFOR flights or to humanitarian assistance, and it is to be monitored by UNPROFOR.

55. The Security Council had already authorized some Chapter VII authorized actions in the Yugoslav theatre. A resolution passed in August of 1992 specifically invokes Chapter VII of the Charter as it calls upon States "to take . . . all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina." S.C. Res. 770, U.N. Doc. S/RES/770 (1992).

56. The Security Council recommended to the General Assembly that Yugoslavia (Serbia and Montenegro) be required to apply for membership in the UN, considering "that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist." S.C. Res. 777, U.N. Doc. S/RES/777 (1992). On September 22, 1992 the General Assembly passed a resolution which in effect expelled the truncated Yugoslav state from the UN by requiring it to submit a new application for membership. U.N. doc. A/RES/47/1 (1992).

57. See Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989).

has moved beyond mere intercession, and even beyond traditional peacekeeping, into a transitional role in the administration of Cambodia. Up to 15,000 troops will be sent to demobilize the four armed local factions in Cambodia, and an advance team of 1,273 civilian and military personnel was already in place by February of 1992. The plan is for UNTAC to take over the civil administration of the country, oversee the human rights situation, reorganize a national defense force, and then help to bring about a democratic electoral process and certify free elections before leaving. This is the most ambitious peacekeeping project which has ever been undertaken by the United Nations. Technically UNTAC, like UNPROFOR, operates upon the consent of the territorial sovereign, and is not a coercive force under Chapter VII of the Charter.

C. *Humanitarian Intervention Through Military Action*

When the breakdown of a state leads to disorder and to widespread violations of human rights, military intervention emerges as a possible response. The debate over the legality of humanitarian intervention has always been a difficult one, in part because it raises questions concerning the priorities between different rules and principles of international law. In a real sense, the issue involves a debate over the relative importance of two types of human rights. On the one hand, there are the human rights of the victims one might hope to protect through intervention; while on the other hand, there is the collective human right of self-determination, which is a corollary of the principle of non-intervention.⁵⁸ When a state asserts its right to be free from foreign intervention, it is in part asserting the collective right of its people to determine their own political destiny.

The argument for humanitarian intervention might be characterized as stemming from natural law; thus to the extent that natural (human) rights are being violated by a government or anyone else, an intervention involving the proportionate use of force to remedy this problem should not be illegal. But the unilateral use of force under the guise of humanitarian intervention remains extremely controversial, especially where there are unanswered questions concerning the popular will of the local people, the level of atrocities which warrant intervention, and the possible ulterior motives of the intervening state.⁵⁹ Reisman notes that "[t]he most satisfactory solution to this problem is the creation of centralized institutions, equipped with decision-making authority and the capacity to

58. R.J. VINCENT, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS* 115 (1986).

59. See Reisman, *supra* note 28, at 875.

make it effective.”⁶⁰ While new, more centralized international institutions have not been forthcoming, the existing multilateral institutions have begun to act more assertively and effectively in the past few years. The tone of the Security Council Summit Declaration quoted above indicates a revitalized new attitude toward multilateral action for human rights. Once again, concerns about the violation of state sovereignty are reduced where there has been a breakdown of state authority.

D. UN Action on Iraq's Repression of its Kurdish Population

The UN authorized use of multilateral force for the liberation of Kuwait was perhaps the most spectacular, and the most coercive, expression so far of the new active United Nations. There was certainly an important humanitarian aspect to that entire operation, but economic and political factors played an even larger role. In a broad sense, though, that operation demonstrated the extent to which it is now possible to mobilize the international community to act in support of the consensus values of the community. The consensus values at stake in Kuwait were many of the most fundamental to state sovereignty: the sanctity of borders, territorial integrity, and the prohibition on the aggressive use of force.

The community value of international peace and security was also at risk, and in an effort to preserve this, the UN has continued to act forcefully in and around Iraq. Acting pursuant to Security Council Resolutions 687, 699, and 707, UN inspectors have conducted a series of intrusive missions on Iraqi territory to survey the extent of that country's nuclear and chemical weapons capability. As might be expected, Iraq has resisted these inspections as unacceptably infringing upon its sovereignty. But instead of backing off in deference to this principle, the UN has strongly protested the obstacles which Iraq has created to its inspections.⁶¹

UN actions with regard to the Kurds in Northern Iraq are more directly relevant to the issue of whether there is a trend towards multilateral action for the protection of human rights. UN Security Council Resolution 688, passed after the end of the Gulf War, injects the UN into

60. *Id.*

61. It is true that in the past states defeated in war have often forfeited their sovereignty, and this may seem to be particularly appropriate when the defeated state was responsible for initiating a war of aggression. What is new here, is that in this case it is an international organization based on the respect of state sovereignty, the United Nations, which is imposing itself upon the territory of the defeated state.

the issue of the welfare of these people.⁶² Operative paragraph 1 of that resolution "condemns the repression of the Iraqi civilian population . . . in Kurdish populated areas" and notes that the consequences of that repression "threaten international peace and security in the region." The mention of a threat to international peace and security is important, because the recognition by the Security Council of such a threat is a prerequisite for enforcement action under Chapter VII of the Charter. While no enforcement action specifically in response to the Kurdish situation has been authorized so far, the language of resolution 688 leaves the door open to this possibility.

Operative paragraph 6 of this resolution "[a]ppeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts." This language comes very close to a multilat-

62. Security Council Resolution 688 reads as follows:

The Security Council,

Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Recalling Article 2, paragraph 7, of the Charter of the United Nations,

Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the region,

Deeply disturbed by the magnitude of the human suffering involved,

Taking note of the letters sent by the representatives of Turkey and France to the United Nations dated 2 April 1991 and 4 April 1991, respectively (S/22435 and S/22442),

Taking note also of the letters sent by the Permanent Representative of the Islamic Republic of Iran to the United Nations dated 3 and 4 April 1991, respectively (S/22436 and S/22447),

Reaffirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Iraq and of all States in the area,

Bearing in mind the Secretary-General's report of 20 March 1991 (S/22366),

1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;

2. *Demands* that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;

3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations;

4. *Requests* the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities;

5. *Requests* further the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population;

6. *Appeals* to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

7. *Demands* that Iraq cooperate with the Secretary-General to these ends;

8. *Decides* to remain seized of the matter.

S.C. Res. 688, U.N. Doc. S/RES/688 (1991) (emphasis in original).

eral authorization of humanitarian intervention, and key members of the Security Council have treated it as such. Soon after the resolution was adopted, British Prime Minister John Major publicly expressed his humanitarian concern about the treatment of Iraqi Kurds. Following his lead, the United States and France joined the United Kingdom in establishing "safe haven" zones of refuge for the Kurds in northern Iraq. Iraq complained that its sovereignty was being violated, but the intervention had been "collectively legitimized" by the action of the Security Council.⁶³ Further UN action to protect the Kurds may be yet to come.

The explicit authorization of humanitarian intervention by the United Nations would be a very radical step indeed, but under Chapter VII of the Charter it could be done if the Security Council decides that international peace and security are at risk. By definition, such intervention implies the limited subordination of state sovereignty in favor of more fundamental humanitarian concerns. Until recently there has never been a consensus within the United Nations that humanitarian concerns *were* more fundamental than state sovereignty. Since Resolution 688 stops short of an unambiguous authorization of humanitarian intervention, the consensus may not quite be there yet.

Nonetheless, resolution 688, and the acts of humanitarian intervention which followed its adoption, provide evidence of a greater willingness on the part of the Security Council to become involved in action to protect human rights. This supports the view that international law may be shifting away from an exclusive focus upon states and their interests.

This is obviously not a simple case of the disintegration of a state leading to human rights violations. The Iraqi regime had been using poison gas attacks and other forms of terror and repression against the Kurds for years before the Gulf War. But it was only when the Gulf War left the Iraqi government in a weakened and desperate state that the UN Security Council became directly involved in attempting to protect the human rights of Iraqi Kurds.

VII. CONCLUSIONS

The concept of state sovereignty reflected in Articles 2(1) and 2(7) of the UN Charter has been the cornerstone of the Westphalian interna-

63. Although the Security Council's appeal for assistance did not constitute an explicit and legally valid authorization of intervention under Chapter VII of the Charter, it did have the effect of politically legitimizing the actions taken. This process of "collective legitimization" is more often associated with resolutions of the UN General Assembly. See I.L. Claude Jr., *Collective Legitimation as a Political Function of the United Nations*, 20 INT'L ORG. 367 (1966).

tional system.⁶⁴ Opposed to this concept are principles of human rights and the self-determination of peoples, which also find their expression in the Charter.

The only way in which these ideas can be reconciled is by recognizing that under the Charter, state sovereignty does not include the right to violate human rights. While this has been the situation *de jure* since 1945, the lack of effective mechanisms of implementation has left states free, *de facto*, to violate the human rights of their own citizens with relative impunity.⁶⁵ Recent developments suggest that the states comprising the international community now attach a greater than ever importance to human rights norms, and that in an increasing number of cases they are willing to take action, both in cooperation with the UN and separately, to implement human rights. The recent practice of states in the international community indicates that traditional concerns about respect for state sovereignty are no longer an absolute bar to international action for human rights even where that action may intrude upon the territory of states.

A. *The Structural Critique of International Law*

The utility of international law in promoting the shared interests of states is not seriously subject to question. If international law did not exist, states would have to invent it. When European states gained sovereignty and freedom from the domination of the Emperor and the Pope after the Thirty Years War they needed a system of law based on respect for the sovereignty and coexistence with other states. In response to this need, the modern system of international law developed over the years, in parallel with the state-centric nation-state system. What remains to be seen is whether international law can now develop into a system which serves the larger needs of the international community as it may come to be defined in terms of supranational and subnational actors as well as states.

It has sometimes been argued that international law is inherently biased, and it is true that for centuries the law of the European Nation-State system failed to protect the interests of those who were colonized,

64. "In traditional international law, the aspirations of individuals for justice, peace and security are served by a system in which territorially identified nation-states are internally and externally sovereign, but are subject to the limiting norms of international law." Gray L. Dorsey, *The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AM. J. INT'L L. 41, 41-42 (1988).

65. There are a few effective mechanisms, of course, such as the Council of Europe's human rights system and the regime under the Optional Protocol to the International Covenant on Civil and Political Rights, but these apply only regionally, or to a small group of self-selected states.

subjugated, and enslaved.⁶⁶ Nonetheless, that system of law has proven to be increasingly effective at protecting the interests of those political entities recognized as States. Now that decolonization has been for the most part completed, and practically the entire surface of the earth is part of the sovereign territory of one state or another, what began as Europe's state-centric legal order serves a broader geographical range of state actors than ever before. The membership of the United Nations now stands at 175 states, including 14 states which were formerly part of the Soviet Union.⁶⁷

At a certain level, and based on a broad principle of respect for state sovereignty, a state-centric system of international law could be quite fair to all *states*, assuming, of course, that one could make whatever adjustments that may be necessary to ensure that the rights of all states are respected.⁶⁸ Even as the number of participants in that system has evolved, there has always been an international consensus *of states* to the effect that international law is and should be state-centric. The question raised by recent developments is whether international law is now growing beyond its state-centric roots.

B. The Dynamic of Change in International Law and Practice

The disintegration of states presents a new challenge to the entire international system of states, but to some extent it is a challenge which states themselves have helped to bring about by their policies of political intervention in the human rights affairs of other states. Such interven-

66. See R.P. ANAND, *INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES* 15-21 (1987).

67. Ukraine and Byelorussia (now known as Belarus) were founding members of the UN, and Russia has succeeded to the membership formerly held by the USSR. The Baltic Republics of Lithuania, Latvia, and Estonia joined the UN in September of 1991, and Armenia, Azerbaijan, Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, and Turkmenistan were admitted on March 2, 1992.

68. It would by no means be easy to achieve a consensus on what changes might be necessary to perfect the fairness of a state-centric legal order. Even if one were to define the task of international law in simple terms as "protecting the sovereignty of every state," there is considerable dispute as to the present meaning of the term "sovereignty." Contentious issues include whether sovereignty includes a completely free liberty of contract (the principle of "Permanent Sovereignty over Natural Resources" is relevant here), whether the effective sovereignty of former colonies and poor states requires that they receive compensation from rich states, and whether such an obligation to compensate could be consistent with the sovereignty of rich states. These contentious issues, and many others tied to the scope of "state sovereignty" are all raised in one way or another by the resolutions passed by the UN General Assembly in 1974 which formulate the call for a New International Economic Order. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 INT'L LEGAL MATER. 715 (1974); *Programme of Action on the Establishment of a New International Economic Order*, G.A. Res. 3202, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 5, U.N. Doc. A/9559 (1974), reprinted in 13 INT'L LEGAL MATER. 720 (1974).

tion is legally and morally defensible, but the political consequences have proven to be greater than anticipated.

Clearly, new international legal mechanisms and norms are needed to deal with these new challenges. In times of disintegration, national minorities need protection which goes beyond mere expressions of international concern, and any government which violates the fundamental human rights of its citizens should be subject to international pressure to change. Governments should not be able to escape such humanitarian pressure simply by invoking an expansive notion of state sovereignty as a shield. In practice it seems to be increasingly difficult for them to do so.

Taken together, the changes which may be coming, along with those which have already taken place, constitute a "Copernican revolution" in international law, defining a new center for the international legal universe. Any such revolution is likely to encounter resistance, as it threatens long-held conceptions of the essential nature of the order in which we live. While human society could not ultimately alter the fact that the universe does not revolve around the Earth, the definition of our international legal and political universe is subject to human control.

There is no scientific or metaphysical inevitability to the development of a less state-centric international order, but recent developments suggest that the actions of states, groups, international organizations, and individuals may nonetheless be destined to bring this about. We are now living through what may prove to be a decisive transitional phase, and the special set of humanitarian problems presented by the disintegration of states may provide a key impetus for this change.⁶⁹

69. The vacuum of government authority in Somalia subsequent to the ouster of General Mohamed Siad Barre's regime in January 1991, provided an unusually clear and shocking illustration of how the disintegration of state authority can undermine basic human rights. As feuding warlords and armed bands battled each other and looted food shipments, the total collapse of central authority made it impossible for international relief efforts to relieve the widespread famine in Somalia.

On December 2, 1992, just as this article went to press, the United Nations Security Council adopted Resolution 794 regarding the situation in Somalia. Operative paragraph 10 of that resolution provides that the Security Council:

"ACTING UNDER Chapter VII of the Charter of the United Nations, AUTHORIZES the Secretary-General and member states cooperating to implement the offer . . . [of military assistance made by the United States] . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."

This is the first time that the Security Council has authorized the use of force under Chapter VII of the UN Charter for reasons which are purely humanitarian in nature. Article 39 of the Charter provides that action under Chapter VII is to be taken only in response to a threat to the peace, breach of the peace or act of aggression. Accordingly, the preamble of resolution 794 contains an explicit determination that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security."

That preamble also explicitly recognizes "the unique character of the present situation in

Somalia and . . . its deteriorating, complex and extraordinary nature.” Although some have expressed concern about the decision to allow the United States to retain command of this mission, the vote for Resolution 794 in the Security Council was unanimous; and thus even China, which traditionally abstains on matters involving the use of UN forces, publicly agreed that this international action was necessary. For the moment, international community seems to have reached a point where multilaterally authorized humanitarian intervention is a legally and politically viable option, at least where local state authority has completely broken down as it has in Somalia. This is just the most recent evidence that humanitarian concerns have caused the international legal order to evolve beyond the purely state-centric model.